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No. 80-1865

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term 1980

DONALD LEE ABESS,
Petitioner,

-VS-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Court of Appeals No. 80 5032

Carl Ziemba
Attorney for Petitioner
Business Address:
2000 Cadillac Tower
Detroit, Michigan 48226
Telephone: (313) 962-0525

AMERICAN PRINTING COMPANY
1200 WEST FORT STREET, DETROIT, MICHIGAN 48226 — (313) 963-9310

QUESTIONS PRESENTED FOR REVIEW

I.

Where petitioner and others were charged with devising a scheme to defraud an insurance company by faking the theft of an insured auto and submitting a claim to the company, was use of the mails in the scheme sufficiently proved by testimony of the claims manager of the insurance company that the checks drawn in payment of claims are '[m]ost generally . . . sent through the mail'?

II.

Where defendant was convicted of devising with others a scheme to defraud an insurance company by faking the theft of an insured auto and submitting a claim to the company in violation of 18 USC 1341 and was also convicted of conspiracy to devise a scheme to defraud an insurance company by faking the theft of an insured auto and submitting a claim to the company, has not the defendant been convicted twice of the same offense?

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-vs-

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Court of Appeals No. 80 5032

Donald Lee Abess, petitioner, by his attorney, Carl Ziemba, respectfully prays this Court issue a Writ of Certiorari to review the Order of judgment of the United States Court of Appeals for the Sixth Circuit entered April 9, 1981 in Docket No. 80-5032.

JURISDICTION OF THE COURT

The Order of judgment of the United States Court of Appeals for the Sixth Circuit sought to be reviewed herein is dated April 9, 1981 and was entered on April 9, 1981.

Jurisdiction is conferred by 28 USC § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

18 USC 1341:

> 'Whoever, having devised or intending to devise any Scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.'

5th Amendment, United States Constitution:

> ' . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . .'

18 USC 371:

> 'If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> 'If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.'

STATEMENT OF THE CASE

If a four count indictment, petitioner and one John Abess and others were charged with having violated, in the first three counts, provisions of 18 USC 1341, and in the fourth count with having conspired to violate provisions of 18 USC 1341.

Before trial, John Abess pleaded guilty to one count of the indictment. Petitioner stood trial alone before a jury.

On trial, the court directed a verdict of acquittal on Count I of the indictment.

Essentially, the indictment charged that petitioner and John Abess and one Sandra Hadrian devised a scheme wherein Hadrian's auto, which was insured against theft, would be driven to Mexico and Hadrian would submit false claims for loss of the auto through theft and for loss of personal property in the trunk of the auto.

Thus, in Count II of the indictment it was charged in essence that the named accused persons received in the mails a check for $5,000 from the insurance company for

the loss of the auto. The Government's theory was that Hadrian had received the check in the mail.

In Count III of the indictment it was charged in essence that the named accused persons received in the mails a check for $200 from the insurance company for the loss of a coat. The Government's theory was that Hadrian had received the check in the mail.

In Count IV of the indictment it was charged in essence that the named accused persons conspired in violation of 18 USC 371 to violate 18 USC 1341 in terms spelled out in Counts I and II.

The evidence adduced on trial construed most favorably to the prosecution established that petitioner and John Abess counselled Sandra Hadrian to solve her problem with the mechanical failures of her car by having it stolen. Hadrian, following the advise given by petitioner and John Abess, parked her car at a shopping center. While she shopped, her car was removed; it was not shown by whom. Hadrian reported the car stolen. She filed a claim with her insurance company for loss of the car and for loss of a coat and other clothing in the trunk. The car apparently was driven to Mexico.

The insurance company issued two checks to Hadrian. One was in the amount of $5000 for the loss of the car; and the other was for $200 for the loss of the coat. Hadrian used the proceeds to buy another car.

John Abess did not testify on trial. Sandra Hadrian did testify. Her testimony established the scheme as involving her and John Abess. Petitioner was implicated by taped intercepted telephone conversations between him and John Abess.

Hadrian apparently went to the insurance company office to file her claim. Her testimony on this point was restricted to the following:

> Q. [By government counsel] Can you tell the Court and the jury, specifically, what you did with respect to your insurance company?
>
> A. I made a phone call to them and then I went to the office, but I don't remember if it was the same day or not. [Tr 146]

Hadrian was asked by government counsel how she received the $5000 check, but he didn't ask her how she received the $200 check. As to the $5000 check, Hadrian's testimony was as follows:

> Q. (By Mr. Cook, continuing): Miss Hadrian, can you tell the Court and jury, if you recall, when and how you received that check [for $5000]?
>
> A. I really don't remember if it was handed to me or if I received it in the mail.
>
> * * *
>
> Q. You indicated that there was a possibility you might have received that check in person. Do you recall whether that might have been if in fact you had received it in person?
>
> A. I don't really recall where the office was; I think it was on Inkster Road.
>
> Q. Had you been to the office yourself?
>
> A. I don't remember. I must have, but I don't remember. [Tr 151-52]

The only other testimony on the subject of how the two checks got to Hadrian's possession was given by the claims manager of the insurance company as follows:

> Q. Do you know how these drafts were transmitted to the insured or your office?

A. They would be completed at the direction of an adjuster and mailed to the insured.

Q. Now, when you say they would be mailed to the insured, what is your basis for saying that in terms of the practice of your office?

A. This is normal operating procedure. The work goes through the workflow at which point it is placed in an envelope and sent to the insured.

Q. Would it be extremely unusual for a draft to be transmitted other than by mail?

A. Most generally they are sent through the mail. [Tr. 194]

Petitioner rested without adducing any evidence whatever. Petitioner's motion for directed verdicts of acquittal on Counts II, III and IV for insufficient proofs was denied by the trial court.

Petitioner was found guilty by the jury on Counts II, III and IV, and the court sentenced petitioner to a two year term on each of the three counts, the sentences to run concurrently.

On appeal to the United States Court of Appeals for the Sixth Circuit, the Court rejected petitioner's contention that 'there was not sufficient proof that either of these checks moved in the mail'. However, the Court vacated judgment of conviction as to Count III, stating:

> 'We are of the opinion, however, that since there is a failure of proof as to separate mailing of these two checks, not only must one of the two sentences be set aside but also that the conviction on one of these counts must be set aside.'

The Court affirmed petitioner's convictions on Counts II and IV.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS WAS CLEARLY IN ERROR IN HOLDING THAT SUFFICIENT EVIDENCE OF THE MAILING OF THE CHECKS WAS ADDUCED TO SUPPORT THE CONVICTIONS. SUCH DEVIATION CALLS FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Testimony of the claims manager of the insurance company that '[m]ost generally' checks in payment of claims 'are sent through the mail' is just not sufficient to establish beyond a reasonable doubt that the two checks in the case at bar were mailed to Hadrian.

It is clear that the elements of the charge under 18 USC 1341 are (1) the scheme to defraud, and (2) causing a mailing for the purpose of executing the scheme. *Pereira* v *United States,* 347 US 1,8 (1954).

But as stated in *United States* v *Masen,* 639 F2d 1340, 1341 (CA5 1981), where the charge was that the defendant, a felon, received a gun in interstate commerce:

> 'It is elementary as any remark which Sherlock Holmes ever made to Dr. Watson that by prosecuting this case the government assumed the burden of proving by the evidence beyond a reasonable doubt that Masen had *received* the gun *via* a shipment in interstate commerce. Proof that he might have done it, or could have done it, is not enough.' [Emphasis by the Court.]

The Court went on to hold that testimony that 'Masen was the authorized warranty repairmen for Browing guns' but 'that guns which came in by mail were *normally* left at the front of the store and if a signature was required, any one of the several employees could and would sign for it' and that '[i]f the package was addressed to Masen it was normally sent back to him; but if he was not in, another employee would normally receive it and sign for it', 629 F2d at 1341 [emphasis by the Court] was such 'that no reasonably minded jury could have believed from this

evidence beyond a reasonable doubt that Masen, rather than The Gun Store, received this shotgun', 639 F2d at 1342.

From the testimony of Hadrian, one could reasonably conclude that she filed her claim by visiting the offices of the insurance company personally. She could not recall whether she received the checks in the mail or was handed them.

Hadrian's testimony certainly raised the real possibility that she had gone to the offices of the insurance company to pick up the checks. The testimony of the claims manager when invited to testify that 'it [would] be extremely unusual for a draft to be transmitted other than by mail' was that '[m]ost] generally they are sent through the mail'.

This testimony can only have left the door open to the jury to guess or conjecture that the two checks were sent through the mails to Hadrian. This does not comport with the constitutional standard of proof beyond a reasonable doubt of the element of causing a mailing for the purpose of executing the scheme.

II. THIS COURT SHOULD DECIDE THE QUESTION WHETHER CONSPIRACY TO DEVISE A SCHEME TO DEFRAUD IS THE SAME CRIME AS TWO OR MORE PERSONS DEVISING A SCHEME TO DEFRAUD.

The proposition here is the following: When two or more persons devise a scheme to defraud they have actually conspired to defraud, and when two or more persons have conspired to defraud by devising a scheme to defraud, they have merely in concert agreed upon the devising of a scheme to defraud. In short, the doing of the one is the same as the doing of the other.

Hence, it is improper and violative of the double jeopardy provisions of the *5th Amendment* to convict an

accused of a charge of devising a scheme to defraud and of a conspiracy to devise a scheme to defraud when the scheme and the fraud in both charges are the same.

That is the situation in the case at bar. Petitioner was convicted under Count II of devising a scheme with another to defraud the insurance company of $5000 through the filing of a false claim for theft of an auto, and he was convicted under Count IV of having conspired with same person to devise a scheme to defraud the same insurance company of the same $5000 through the filing of the same false claim for theft of the same automobile.

In *United States* v *McNeive*, 536 F2d 1245, 1247 (CA8 1976), the Court said that 'the term "scheme to defraud" denotes some degree of planning by the perpetrator'. It follows *a fortiori* that a scheme to defraud devised by two or more persons denotes some degree of planning and agreement between them as to what will be done. This is the classic definition of a conspiracy.

The close similarity between a mail fraud scheme and a conspiracy was recognized by the Court in *United States* v *Amrep Corporation*, 560 F2d 539, 545 (CA2, 1977) when the Court considered the question of the admissibility of hearsay statements of one participant in the scheme against another:

> 'The admissibility of evidence in a mail fraud scheme involving two or more persons is determined similarly to that in a conspiracy. "The acts and declarations of each party to the scheme made in furtherance or execution thereof are admissible against all." [Citations omitted] So long as a transaction is within the general scope of a scheme on which all defendants had embarked, a defendant not directly connected with a particular fraudulent act is nonetheless responsible therefor if it was of the kind *as to which all parties had agreed.*' [Emphasis added.]

Hence, petitioner's conviction of conspiracy under Count IV should not be permitted to stand. *North Carolina* v *Pearce*, 395 US 711 (1969).

The above issue was not briefed and raised in the Court of Appeals. Nonetheless, this Court is empowered to recognize plain error and a serious due process question and make whatever ruling required in the interests of justice. *Wood* v *Georgia*, US , 101 S Ct 1097, 1100 (1981).

[Petitioner had other counsel on his appeal to the Court of Appeals.]

RELIEF SOUGHT

This Court should issue its Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,
CARL ZIEMBA
Attorney for Petitioner
Business Address:
2000 Cadillac Tower
Detroit, Michigan 48226
Telephone: (313) 962-0525

Detroit, Michigan
May 1, 1981

APPENDIX

Order of Judgment Sought to be Reviewed.
United States Court of Appeals, 6th Circuit.
United States of America v Donald Lee Abess.
No 80-5032—Entry of Judgment was April 9, 1981.

NO. 80-5032

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v

DONALD LEE ABESS,
Defendant-Appellant

ORDER
(FILED: Apr. 9, 1981)
JOHN P. HEHMAN, *Clerk*

Before: LIVELY and BROWN, Circuit Judges; CECIL, Senior Circuit Judge.

Appellant, Donald Abess, was charged in the indictment in Counts 1, 2 and 3 with mail fraud and in Count 4 with conspiracy to commit mail fraud. The district court directed a verdict as to Count 1 on the ground that the claim for reimbursement for the "stolen" car was not shown to have moved in the mails. The jury convicted as to Counts 2, 3 and 4 and the district judge imposed a two year sentence on each count to run concurrently.

This indictment charged a scheme and conspiracy to defraud an insurance company by creating a false impression that an insured automobile had been stolen and thereby collecting for the loss of the automobile. Count 2 of the indictment is based on a mailing of a $5,000 check from the insurance company to the owner of the automobile for the loss of the automobile and Count 3 of the indictment is based on a mailing of a $200 check to the owner covering loss of clothing in the trunk of the automobile. Abess contends, and the government agrees, that there is no evidence in the record to show that these two checks were

separately mailed and that therefore there is no proof to support a conviction as to each of Count 2 and Count 3. The government contends, however, that the conviction under neither count should be reversed since Abess received a two year concurrent sentence under each count. We are of the opinion, however, that since there is a failure of proof as to a separate mailing of these two checks, not only must one of the two year sentences be set aside but also that the conviction on one of these counts must be set aside. Accordingly, it is the conclusion of the court that the judgment of conviction as to Count 3 will be vacated.

Abess makes other contentions, including the contention that there was not sufficient proof that either of these checks moved in the mail, the contention that a key government witness had been granted immunity which agreement had not be revealed, and the contention that the prosecution made improper arguments to the jury. Upon consideration, the court is of the opinion that none of these contentions are a proper basis for reversing the conviction as to Counts 2 and 4.

It is therefore Ordered that the judgment of conviction under Count 3 be and the same is hereby vacated and the count is dismissed; it is further Ordered that the judgment of conviction with respect to Counts 2 and 4 be and the same is hereby affirmed.

ENTERED BY ORDER OF THE COURT
(s) JOHN P. HEHMAN
Clerk

Indictment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOHN EUGENE "Jack" ABESS, and
DONALD LEE "Donnie" ABESS,
Defendants.

CRIMINAL ACTION
NO.

VIOLATIONS:

18 U.S.C. 1341—Mail Fraud
18 U.S.C. 371—Conspiracy

INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE

(18 U.S.C. 1341—Mail Fraud)

1. From on or about October 1, 1976, and continuing through on or about May 10, 1977, in the Eastern District of Michigan, JOHN EUGENE "Jack" ABESS, DONALD LEE "Donnie" ABESS, Defendants herein and others, willfully and knowingly devised, and intended to devise a scheme and artifice to defraud by means of false and fraudulent pretenses and representations, and thereby to obtain money from the Citizen's Insurance Company of America (hereafter "Citizen's Insurance"); and the said JOHN EUGENE "Jack" ABESS, DONALD LEE "Donnie" ABESS and others, for the purpose of executing said scheme and artifice to defraud, did cause to be delivered by mail, according to the directions thereon, a certain claim and claim-related matters, and to receive and take from an authorized depository for mail matter a check or draft issued in satisfaction of the liability represented by said claim.

2. It was a part of said scheme and artifice to defraud that said Sandra Amelia Hadrian (hereafter "Hadrian"), who at all times pertinent hereto owned a certain 1974 Cadillac de Ville and as such had insured said Cadillac against loss by theft with Citizen's Insurance, would leave and otherwise abandon said Cadillac automobile at a location prearranged with the co-defendant JOHN EUGENE "Jack" ABESS.

3. It further was a part of said scheme and artifice to defraud that the co-defendants JOHN EUGENE "Jack" ABESS and DONALD LEE "Donnie" ABESS would take and remove, and cause to be taken and removed said Cadillac de Ville from the location prearranged with Hadrian to a second location in Mexico, with the assistance of one "Albert" or "A.J." and various other persons whose names to the Grand Jury are unknown.

4. It further was a part of said scheme and artifice to defraud that Sandra Hadrian, upon notification from the co-defendant JOHN EUGENE "Jack" ABESS that said Cadillac de Ville safely had been removed, then would report to police the "theft" of the car, Hadrian knowing full well that such report was false and that the 1974 Cadillac had not been stolen.

5. It further was a part of said scheme and artifice to defraud that Hadrian, following the above-described "theft" report to police, would submit to Citizen's Insurance a claim under Hadrian's policy for reimbursement in the amount of $5,000.00 (Five Thousand Dollars) for loss of the vehicle by said "theft", and additionally would submit a claim for Two Hundred Dollars ($200.00) for a coat said to be in the trunk of the Cadillac de Ville.

6. On or about October 29, 1976, JOHN EUGENE "Jack" ABESS and DONALD LEE "Donnie" ABESS, the Defendants, for the purpose of executing the above-described scheme and artifice to defraud and

attempting to do so, knowingly caused to be placed in an authorized depository for mail matter, to be sent and delivered by the Post Office Department of the United States according to the directions thereon, from the Southfield (Michigan) Police Department to William J. McGill, Citizen's Insurance Company of America, 10551 Allen Road, Allen Park, Michigan, Southfield police report No. 76-20275, the subject of which was the reported theft of Hadrian's 1974 Cadillac de Ville (VIN 6D47R4Q127989).

All in violation of Title 18, United States Code, Section 1341 and 2.

COUNT TWO

(18 U.S.C. 1341—Mail Fraud)

1. The Grand Jury realleges herein and incorporates by reference the entirety of paragraphs one, two, three, four and five, as contained in Count One of this Indictment.

2. On or about December 2, 1976, JOHN EUGENE "Jack" ABESS and DONALD LEE "Donnie" ABESS, the Defendants, for the purpose of executing the above-described scheme and artifice to defraud and attempting to do so, received and took, and caused to be received and taken from an authorized depository for mail matter a check or draft from Citizen's Insurance Company of America payable in the amount of Five Thousand Dollars ($5,000.00) to Sandra Amelia Hadrian, in satisfaction of the liability represented by the aforesaid claim by Hadrian for the loss of her 1974 Cadillac de Ville.

All in violation of Title 18, United States Code, Sections 1341 and 2.

COUNT THREE

(18 U.S.C. 1341—Mail Fraud)

1. The Grand Jury realleges herein and incorporates by reference the entirety of paragraphs one, two, three, four and five, as contained in Count One of this Indictment.

2. On or about December 2, 1976, JOHN EUGENE "Jack" ABESS and DONALD LEE "Donnie" ABESS, the Defendants, for the purpose of executing the above-described scheme and artifice to defraud and attempting to do so, received and took, and caused to be received and taken from an authorized depository for mail matter a check or draft from Citizen's Insurance Company of America, payable in the amount of Two Hundred Dollars ($200.00) to Sandra Amelia Hadrian, in satisfaction of the liability represented by the aforesaid claim by Hadrian for the loss of a coat.

All in violation of Title 18, United States Code, Sections 1341 and 2.

COUNT FOUR

(18 U.S.C. 371—Conspiracy)

1. The Grand Jury realleges herein and incorporates by reference the entirety of paragraphs one, two, three, four and five, as contained in Count One of this Indictment.

2. From on or about October 1, 1976, and continuing through on or about May 10, 1977, in the Eastern District of Michigan, JOHN EUGENE "Jack" ABESS and DONALD LEE 'Donnie" ABESS, Defendant co-conspirators and others, did combine, conspire, confederate and agree together and with each other, to devise and employ a device, scheme and artifice to defraud the Citizen's Insurance Company of America, in violation of Title 18, United States Code, Section 1341.

OVERT ACTS

At the following times and places, and in furtherance of the conspiracy to devise and employe a scheme and artifice to defraud, the following overt acts were committed.

(a) On or about October 16, 1976, the co-conspirator JOHN EUGENE "Jack" ABESS had a conversation by telephone with the co-conspirator DONALD LEE "Donnie" ABESS.

(b) On or about October 19, 1976, Sandra Amelia Hadrian had a conversation by telephone with JOHN EUGENE "Jack" ABESS.

(c) On or about October 19, 1976, the co-conspirator JOHN EUGENE "Jack" ABESS had a conversation by telephone with the co-conspirator RONALD LEE "Donnie" ABESS.

All in violation of Title 18, United States Code, Section 371.

THIS IS A TRUE BILL.

FOREPERSON

(s) JAMES K. ROBINSON
United States Attorney
(s) PAUL E. COFFEY
Special Attorney
Detroit Strike Force
Business Address:
940 Federal Building
Detroit, Michigan 48226
Telephone: 313-226-7252

DATED: August 2, 1979